

Supreme Court, U. S.

FILED

FEB 4 1977

76-1077

No.

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States  
OCTOBER TERM, 1976

UNITED STATES OF AMERICA, PETITIONER

v.

SECURITY NATIONAL BANK

**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE SECOND CIRCUIT**

DANIEL M. FRIEDMAN,  
*Acting Solicitor General,*

RICHARD L. THORNBURGH,  
*Assistant Attorney General,*

FRANK H. EASTERBROOK,  
*Assistant to the Solicitor General,*

JEROME M. FEIT,  
FREDERICK EISENBUD,  
*Attorneys,*  
*Department of Justice,*  
*Washington, D.C. 20530.*

## INDEX

	Page
Opinion below .....	1
Jurisdiction .....	1
Question presented .....	2
Constitutional provision and statute involved .....	2
Statement .....	2
Reasons for granting the petition .....	6
Conclusion .....	19
Appendix A .....	1a
Appendix B .....	8a

## CITATIONS

### Cases:

<i>Argersinger v. Hamlin</i> , 407 U.S. 25 .....	13
<i>Bellis v. United States</i> , 417 U.S. 85 .....	15
<i>Breed v. Jones</i> , 421 U.S. 519 .....	11, 12
<i>Buckley v. Valeo</i> , 424 U.S. 1 .....	6, 7
<i>Cromwell v. County of Sac</i> , 94 U.S. 351 .....	10
<i>Edelman v. Jordan</i> , 415 U.S. 651 .....	17
<i>Fong Foo v. United States</i> , 369 U.S. 141 .....	16, 17,
	18
<i>G. M. Leasing Corp. v. United States</i> , No. 75-235, decided January 12, 1977 .....	14
<i>Green v. United States</i> , 355 U.S. 184 .....	10
<i>Hague v. C.I.O.</i> , 307 U.S. 496 .....	14
<i>Hale v. Henkel</i> , 201 U.S. 43 .....	7, 13-14
<i>Helvering v. Mitchell</i> , 303 U.S. 391 .....	12
<i>Kepner v. United States</i> , 195 U.S. 100 .....	7
<i>Lange, Ex parte</i> , 18 Wall. 163 .....	12
<i>Montgomery Ward &amp; Co. v. Duncan</i> , 311 U.S. 243 .....	11

## Cases—Continued

## Page

<i>Muniz v. Hoffman</i> , 422 U.S. 454	13
<i>Nashville Milk Co. v. Carnation Co.</i> , 355 U.S. 373	17
<i>New York Central &amp; Hudson River R.R. v. United States</i> , 212 U.S. 481	9
<i>Palko v. Connecticut</i> , 302 U.S. 319	15
<i>Sealfon v. United States</i> , 332 U.S. 575	10
<i>Serfass v. United States</i> , 420 U.S. 377	12
<i>Stone v. Powell</i> , No. 74-1055, decided July 6, 1976	17
<i>United States v. Armco Steel Corp.</i> , 252 F. Supp. 364	17
<i>United States v. Bristol</i> , 473 F.2d 439	4
<i>United States v. Dinitz</i> , 424 U.S. 600	11
<i>United States v. Jenkins</i> , 420 U.S. 358	7
<i>United States v. Kordel</i> , 397 U.S. 1	14
<i>United States v. Macklin</i> , 389 F. Supp. 272, affirmed, 523 F.2d 193	14
<i>United States v. Martin Linen Supply Co.</i> , 534 F.2d 585, certiorari granted, November 1, 1976 (No. 76-120)	11, 18
<i>United States v. Morton Salt Co.</i> , 338 U.S. 632	14
<i>United States v. Oppenheimer</i> , 242 U.S. 85	10
<i>United States v. Sisson</i> , 399 U.S. 267	12
<i>United States v. Southern Ry.</i> , 485 F.2d 309	17
<i>United States v. White</i> , 322 U.S. 694	9
<i>United States v. Wilson</i> , 420 U.S. 332	7, 12
<i>Western Turf Association v. Greenberg</i> , 204 U.S. 359	9, 14
<i>Wheeling Steel Corp. v. Glander</i> , 337 U.S. 562	14
<i>Wilson v. United States</i> , 221 U.S. 361	7

## Constitution and statutes:

## Page

## United States Constitution:

Fourth Amendment	14
Fifth Amendment	2, 9, 13, 14, 15
Sixth Amendment	12, 13

## Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. (Supp. V) 1 and 2:

Section 1	8
Section 2	8
15 U.S.C. 2614	8
15 U.S.C. 2615(b)	8
18 U.S.C. 610	3, 4, 6
18 U.S.C. 656	3
18 U.S.C. 1001	3
18 U.S.C. 3731	2
33 U.S.C. 403	8
33 U.S.C. 407	8
33 U.S.C. (Supp. V) 1311	8
33 U.S.C. (Supp. V) 1319	8
42 U.S.C. (Supp. V) 1857 <i>et seq.</i>	8
42 U.S.C. (Supp. V) 4901 <i>et seq.</i>	8

## Miscellaneous:

Administrative Office of the U.S. Courts, <i>Federal Offenders in United States District Courts</i> (1971)	8
Administrative Office of the U.S. Courts, <i>Federal Offenders in the United States District Courts</i> (1972)	8
Administrative Office of the U.S. Courts, <i>Federal Offenders in the United States District Courts</i> (1973)	8

Miscellaneous—Continued	Page
1 Blackstone, <i>Commentaries</i> (1872) _____	9
Note, <i>Double Jeopardy and Corporations: "Lurking in the Record" and "Ripe for Decision"</i> , 28 Stan. L. Rev. 805 (1976)	14-15

**In the Supreme Court of the United States**

OCTOBER TERM, 1976

—  
No.

UNITED STATES OF AMERICA, PETITIONER

v.

SECURITY NATIONAL BANK

—  
**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE SECOND CIRCUIT**  
—

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

**OPINION BELOW**

The opinion of the court of appeals (App. A, *infra*, pp. 1a-7a) is not yet reported.

**JURISDICTION**

The judgment of the court of appeals (App. B, *infra*, pp. 8a-9a) was entered on December 6, 1976. On

December 29, 1976, Mr. Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including February 4, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

#### QUESTION PRESENTED

Whether the Double Jeopardy Clause applies to corporations.

#### CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

\* \* \* [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb; \* \* \*.

2. The Criminal Appeals Act, 18 U.S.C. 3731, provides in pertinent part:

In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

#### STATEMENT

On September 5, 1975, respondent corporation was indicted in the United States District Court for the Eastern District of New York; it was charged with

nine counts of making unlawful political contributions, in violation of 18 U.S.C. 610. The evidence at trial showed, and respondent admitted, that three officers of the bank<sup>1</sup> asked other bank officers to make monthly political contributions of \$100. Respondent deemed these contributions essential to its business success, and particularly its ability to obtain non-interest bearing municipal accounts (App. A, *infra*, pp. 1a-2a).

Respondent gave to each officer involved in this scheme a salary increase of \$1,700 a year; \$1,200 of this additional salary repaid the cost of the contributions, and the other \$500 was used to cover any additional tax liability on the receipt of the \$1,200. The total cost of this program, which involved more than 40 officers, was several hundred thousand dollars.

Several of respondent's officers also were indicted. The individual defendants claimed that they believed the scheme was lawful. They stated that counsel told them that they could participate in respondent's program if the salary increases were permanent, to be paid even after an officer decided to cease making

---

<sup>1</sup> The three officers were charged with conspiring to cause the bank to make the unlawful contributions. These same officers were also charged with conspiracy to misapply bank funds in violation of 18 U.S.C. 656, and one of them was charged with making false statements in violation of 18 U.S.C. 1001 (App. A, *infra*, p. 2a).

The Statement in this petition recapitulates the statement in the brief for the United States in the court of appeals. Respondents did not challenge this statement in any material detail.

political contributions.<sup>2</sup> Respondent could not invoke the advice-of-counsel defense.<sup>3</sup>

Both respondent and the individual defendants argued, however, that the program was legal because the salary increases were permanent.<sup>4</sup> They maintained that the political contributions made by the officers, on behalf of the bank, to beneficiaries chosen by senior bank officers, came from the officers' money and not the bank's money. Hence, they argued, there was no violation of Section 610, even though no officer received the additional salary unless he first agreed to participate in the political contributions program.

The district court agreed with respondent's interpretation of Section 610. The prosecution objected and, at the suggestion of the district judge (A. 2755), filed a mid-trial petition for a writ of mandamus. Mandamus was denied.<sup>5</sup> The district court

charged the jury that it was an essential element of the offense "[t]hat the contribution charged in the specific count was actually made with bank funds" (A. 2825-2826). Since respondent's program involved the indirect use of bank funds, this instruction amounted to a direction to the jury to acquit the defendants, which it did.

The court of appeals dismissed the government's appeal, holding that the Double Jeopardy Clause applies to corporations in the same way as to natural persons, and that it therefore would bar a second trial of respondent. The government conceded that the Double Jeopardy Clause bars review of the acquittals of the individual defendants,<sup>6</sup> and the court of appeals saw "no valid reason why a corporation which is a 'person' entitled to both equal protection and due process under the Constitution \* \* \* should not also be entitled to the constitutional guaranty against double jeopardy" (App. A, *infra*, p. 5a). The court believed that "[n]o corporation, no matter how large, can pit its resources against the overwhelming might of the State so as to avoid the harassment and the increasing probability of conviction."

---

<sup>2</sup> Counsel denied having given such advice.

<sup>3</sup> Section 610 does not require a showing that a corporate defendant act "willfully." Accordingly, it could not assert an advice-of-counsel defense. *United States v. Bristol*, 473 F.2d 439, 443 (C.A. 5).

<sup>4</sup> Although senior bank officials testified that the salary increases were unconditional, none of the participating officers was so advised (A. 2281, 2283). ("A." designates the appendix in the court of appeals.)

<sup>5</sup> The petition argued that the district court should instruct the jury that, even if it accepted the advice-of-counsel defense, the defendants could still be found guilty of a non-willful violation of Section 610, a misdemeanor. The petition for a writ

---

of mandamus was denied with the following brief statement (A. 57) :

Although at first blush it would appear that it would not be inappropriate for the District Court to give the charge requested by the Government, mandamus is not an appropriate procedure in this case.

<sup>6</sup> The government did not seek appellate review of those acquittals.

tion resulting from reprosecutions" (*id.* at 7a). Therefore, it concluded, "fundamental fairness" requires that the government, having had a full try at establishing criminal wrongdoing, shall not have another" (*ibid.*).

#### REASONS FOR GRANTING THE PETITION

This case presents an important but unresolved question of constitutional law: whether the Double Jeopardy Clause applies to corporations so as to create a rule of finality broader than ordinary principles of *res judicata* and collateral estoppel. Although the issue here arises in the context of an appeal by the United States after a jury verdict of acquittal, the issue can arise whenever a criminal trial of a corporation is terminated under circumstances where the Double Jeopardy Clause would bar a retrial of a natural person.

This case began as an action to enforce a significant congressional plan to keep elections free of the influence of corporate contributions. Cf. *Buckley v. Valeo*, 424 U.S. 1. It was aborted by what we believe was a patently erroneous charge to the jury.<sup>7</sup>

<sup>7</sup> 18 U.S.C. 610, by its terms, defines a contribution as including any "direct or indirect payment." The scheme involved in this case was a prototypical indirect payment ruse; the bank gave money to the officers, and the officers gave money to candidates. But for the officers' promise to make political contributions, the bank would not have increased their salaries. The program carried out by respondent therefore fails the most elementary test of true independence of contributions and expenditures—" [t]he absence of prearrangement and coordination" (*Buckley v. Valeo, supra*, 424 U.S. at 47).

Although the acquittal of the individual defendants is final, we submit that the district court's error can be corrected with respect to respondent, a corporation, just as if the judge had given an erroneous jury instruction in a civil case involving the collection of money penalties.

1. We seek the correction of a jury verdict acquitting a corporation in a criminal case. The Double Jeopardy Clause would bar such review of the acquittal of an individual.<sup>8</sup> The central issue requiring resolution therefore is whether differences between corporations and natural persons justify different treatment under the Double Jeopardy Clause.<sup>9</sup>

The question whether the differences between corporations and natural persons call for different principles of finality in criminal prosecutions is important and unsettled. Although the Court decided 71 years ago that the Self-Incrimination Clause does not apply to corporations,<sup>10</sup> it has never considered whether or to what extent the Double Jeopardy Clause applies to corporations. This problem now requires resolu-

<sup>8</sup> *Kepner v. United States*, 195 U.S. 100; *United States v. Jenkins*, 420 U.S. 358, 369; *United States v. Wilson*, 420 U.S. 332, 351-352.

<sup>9</sup> An appeal by the United States from a judgment terminating a criminal prosecution is authorized by 18 U.S.C. 3731 unless further proceedings are barred by the Double Jeopardy Clause. *United States v. Wilson, supra*, 420 U.S. at 337-339.

<sup>10</sup> *Hale v. Henkel*, 201 U.S. 43, 74-75. See also *Wilson v. United States*, 221 U.S. 361.

tion, for it controls the conduct of litigation under a multitude of statutes running the gamut of federal regulation of business affairs. The antitrust laws<sup>11</sup> and laws concerning the environment<sup>12</sup> are but two examples of regulatory provisions containing criminal sanctions. Approximately 90 percent of the criminal convictions involving corporations grow out of violations of regulatory statutes.<sup>13</sup>

The decision of the court of appeals makes the enforcement of these public welfare measures both more difficult and less uniform, giving incorporeal abstractions the benefit of a rule that errors in their favor are unreviewable, although errors in the government's favor remain reviewable on appeal. As a result, identically situated corporations may receive different treatment, depending on the judge

<sup>11</sup> See Sections 1 and 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. (Supp. V) 1 and 2.

<sup>12</sup> See 15 U.S.C. 2614 and 2615(b) (toxic substances); 33 U.S.C. 403 and 407 (rivers and harbors protection); 33 U.S.C. (Supp. V) 1311 and 1319 (water pollution); 42 U.S.C. (Supp. V) 4901 *et seq.* (noise).

<sup>13</sup> Administrative Office of the U.S. Courts, *Federal Offenders in United States District Courts* 62 (1971) (527 of 591 convictions of corporations were for regulatory offenses); Administrative Office of the U.S. Courts, *Federal Offenders in the United States District Courts* Table 5, p. 31 (1972) (559 of 637 convictions of corporations were for "other special offenses," a category synonymous with regulatory offenses in the 1971 data); Administrative Office of the U.S. Courts, *Federal Offenders in the United States District Courts* Table 5, p. 31 (1973) (445 of 498 convictions of corporations were for "other special offenses").

who tries the case. Moreover, many of these business regulatory statutes are complex and raise sophisticated legal issues in their application; judicial resolution of problems and uncertainties in the law is hindered by lack of access to appellate consideration of disputed questions. All of this undermines the ability of the criminal justice system effectively to carry out the task of enforcing compliance with the law.

2. We submit that neither the history nor the purposes of the Double Jeopardy Clause support a rule that errors during trial in favor of a corporate defendant should be immune from appellate scrutiny. To the contrary, because a criminal case exposes a corporation to no sanction other than a money judgment, jury verdicts involving corporations should be open to the same appellate scrutiny as those in civil cases.

a. The Framers of the Bill of Rights were not concerned about the rights of corporations in criminal cases. At common law a corporation was deemed incapable of committing a crime.<sup>14</sup> The Framers were concerned primarily with "protecting individual civil liberties" (*United States v. White*, 322 U.S. 694, 700), and it has long been settled that the "liberty" protected by the Fifth Amendment "is the liberty of natural, not artificial, persons" (*Western Turf Association v. Greenberg*, 204 U.S. 359, 363). If the meaning of the Double Jeopardy Clause were

<sup>14</sup> See 1 Blackstone, *Commentaries* \*476 (1872); *New York Central & Hudson River R.R. v. United States*, 212 U.S. 481, 492.

fixed by history, therefore, it would not apply to corporations.

b. The language and purposes of the Clause also demonstrate that it should not apply to corporations. Corporations differ from natural persons in several important respects that are highly pertinent to this inquiry. Corporations, unlike natural persons, cannot be imprisoned. Corporations, unlike natural persons, have no emotions. Because of these differences, corporations can be afforded adequate protection by conventional principles of *res judicata* and collateral estoppel and do not need the special rules of finality that the Double Jeopardy Clause extends to natural persons.

The Double Jeopardy Clause erects a safeguard against multiple convictions for the same crime. Principles of *res judicata* do the same,<sup>15</sup> and the present case presents no problem concerning exposure to multiple punishments. The question, rather, is whether respondent may be exposed to a second trial at which the jury will decide its guilt on the basis of correct instructions on the law.

The considerations supporting the prohibition against multiple trials of individuals for the same offense were discussed in *Green v. United States*, 355 U.S. 184, 187-188, which observed that "[t]he underlying idea \* \* \* is that the State with all its resources and power should not be allowed to make repeated

<sup>15</sup> *United States v. Oppenheimer*, 242 U.S. 85, 88; *Sealfon v. United States*, 332 U.S. 575; *Cromwell v. County of Sac*, 94 U.S. 351, 352-353.

attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."<sup>16</sup> See also *Breed v. Jones*, 421 U.S. 519. Corporations, however, experience no "embarrassment"; they are insensate and feel no "anxiety" or "insecurity." Thus, few of the concerns central to the prohibition against multiple trials apply to corporations.

Corporations doubtless would incur additional expenses and suffer the enhanced possibilities of conviction associated with second trials. But in this regard civil and criminal cases are identical. Civil cases routinely are retried when the instructions to the jury are prejudicially erroneous. Criminal cases should not be treated differently merely because they are denominated "criminal." The only punishment facing a corporation if it is convicted in a criminal case is an order to pay money, the same fate it faces if it loses in a civil case; yet second trials are held in civil cases when the instructions to the jury are erroneous. *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243. The Court has repeatedly held that labels do not control the meaning of the Double

<sup>16</sup> The bar against repetitious trials is not absolute. See *United States v. Dinitz*, 424 U.S. 600, and the discussion at pages 12-19 of our brief in *United States v. Martin Linen Supply Co.*, certiorari granted, November 1, 1976 (No. 76-120). We are furnishing to counsel for respondent our brief in *Martin Linen*.

Jeopardy Clause.<sup>17</sup> Insofar as corporations are concerned, the difference between civil and criminal cases is primarily one of label<sup>18</sup>—whatever the label, it is exposed to a money judgment but not to imprisonment.<sup>19</sup>

The fact that the corporation faces only an order to pay money has special importance because the Double Jeopardy Clause is framed in terms of jeopardy of “life or limb.” Although the Court has interpreted this phrase to include all imprisonment,<sup>20</sup> that interpretation still does not reach corporations, which cannot be imprisoned.

The Court has recognized that there is a fundamental difference, for many purposes, between imprisonment and all other punishments. The Sixth Amendment confers a right to counsel only when the

<sup>17</sup> See *United States v. Sisson*, 399 U.S. 267, 270; *United States v. Wilson*, *supra*, 420 U.S. at 335-339, 347-351; *Sarfass v. United States*, 420 U.S. 377, 392.

<sup>18</sup> The use of the label “criminal” rather than “civil” does not in itself have a damning effect. Many “criminal” prosecutions are essentially regulatory in nature and do not expose the corporation to public obloquy; on the other hand, a civil suit charging a corporation with selling botulism-contaminated vichyssoise would have a catastrophic effect on business. It is the nature of the accusation, not the civil or criminal label, that determines the effect on the corporation.

<sup>19</sup> Indeed, the equivalent of capital punishment for corporations—revocation of the corporate charter—is civil in nature because it involves only the revocation of a license. *Helvering v. Mitchell*, 303 U.S. 391, 399.

<sup>20</sup> *Ex parte Lange*, 18 Wall. 163; *Breed v. Jones*, *supra*, 421 U.S. at 528.

accused is exposed to imprisonment (*Argersinger v. Hamlin*, 407 U.S. 25); the Sixth Amendment right to jury trial also depends upon the seriousness of the punishment, and “[f]rom the standpoint of determining the seriousness of the risk and the extent of the possible deprivation faced by a [defendant], imprisonment and fines are intrinsically different” (*Muniz v. Hoffman*, 422 U.S. 454, 477). The potential exposure to imprisonment is the primary source of the “anxiety” and “insecurity” experienced by natural persons in criminal cases; take away the possibility of imprisonment, and a criminal prosecution is little different (insofar as the interests protected by the Double Jeopardy Clause are concerned) from many civil cases.<sup>21</sup>

c. The differences between corporations and natural persons account for the fact that the Self-Incrimination Clause of the Fifth Amendment does not apply to corporations. *Hale v. Henkel*, 201 U.S.

<sup>21</sup> Individuals may suffer collateral consequences of criminal convictions, such as deportation, loss of the right to vote, and inability to possess a firearm. But corporations are not deported, do not vote, and do not carry weapons. The collateral consequences of criminal convictions by and large do not pertain to corporations. Congress might attach some collateral consequences (such as debarment from government contracts) to criminal convictions of corporations, but it also provides for such consequences in civil proceedings. If the collateral consequences of a conviction are not inherently “criminal”, then the fact that there may be such consequences does not call the Double Jeopardy Clause into play.

43, 74-75.<sup>22</sup> Moreover, corporations, although protected by the Fourth Amendment (*G. M. Leasing Corp. v. United States*, No. 75-235, decided January 12, 1977), are not entitled to the same protection of privacy as natural persons (*United States v. Morton Salt Co.*, 338 U.S. 632, 651-652). A corporation is not a "person" entitled to indictment by grand jury. *United States v. Macklin*, 389 F. Supp. 272 (E.D. N.Y.), affirmed, 523 F.2d 193 (C.A. 2). And, although it is a "person" entitled to the protection of its "property" under the Due Process Clause of the Fifth Amendment, a corporation has no "life" or "liberty" interests.<sup>23</sup>

A corporation is a legal construct; it is a convenient device for the accumulation and employment of capital, and it bestows limited liability on its shareholders. There is no reason why corporations, creatures of the law rather than of nature, should be endowed with constitutional rights more extensive than necessary to protect their legitimate property interests. We submit that the ordinary principles of *res judicata* are sufficient, in a criminal case, to protect the legitimate interest of corporations in the finality of judgments. See Note, *Double Jeopardy*

<sup>22</sup> A corporation has no privilege against self-incrimination whether it is called on to produce information through agents (as in *Hale*) or in its own name (as in *United States v. Kordel*, 397 U.S. 1).

<sup>23</sup> Compare *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, with *Western Turf Association v. Greenberg*, *supra*, and *Hague v. C.I.O.*, 307 U.S. 496.

and Corporations: "Lurking in the Record" and "Ripe for Decision", 28 Stan. L. Rev. 805 (1976).

d. The court of appeals thought that, unless the Double Jeopardy Clause applied to corporations to the same extent that it applies to natural persons, the shareholders of corporations (particularly small or closely held corporations) would be exposed to anxiety, distress, humiliation and expense because of successive prosecutions (App. A, *infra*, pp. 5a-7a). It also expressed concern that the government would use its resources to harass and eventually to overwhelm corporations accused of wrongdoing (*id.* at 7a). The latter concern is not well founded; principles of *res judicata* and collateral estoppel will prevent unjustified relitigation or harassment.<sup>24</sup>

The court's concern for the non-pecuniary interests of the shareholders fares no better, in light of this Court's treatment of the Self-Incrimination Clause of the Fifth Amendment. The cases holding that corporations and partnerships have no privilege against self-incrimination are summarized in *Bellis v. United States*, 417 U.S. 85. The Court recognized in *Bellis*

<sup>24</sup> We ask no more than "that the case against [respondent] shall go on until there shall be a trial free from the corrosion of substantial legal error. \* \* \* This is not cruelty at all, nor even vexation in any immoderate degree. If the trial had been infected with error adverse to the accused, there might have been review at his instance, and as often as necessary to purge the vicious taint. A reciprocal privilege \* \* \* granted to the state \* \* \* [is] no seismic innovation. The edifice of justice stands, its symmetry, to many, greater than before." *Palko v. Connecticut*, 302 U.S. 319, 328.

that denying the privilege to a partnership or corporation often has the practical effect of denying the privilege of a natural person; a corporation may be the alter ego of a person, and to compel a person to produce the records of a corporation may be to compel him to produce records that will incriminate himself.

Nevertheless, the Court has rejected the argument that the needs and privileges of natural persons may be conferred upon corporations merely because they are associated in business. A person seeking to do business as a corporation must take the bitter with the sweet; just as the corporation's debts cannot be attributed to him, so his human emotions and concerns cannot be attributed to the corporation. Indeed, as the foregoing discussion suggests, there are even stronger reasons for concluding that the Double Jeopardy Clause does not apply to corporations than there are for the like conclusion regarding the Self-Incrimination Clause.

3. The court of appeals, in addition to deciding the merits of the double jeopardy question, stated (App. A, *infra*, pp. 2a-4a) that independent consideration of the question is foreclosed by *Fong Foo v. United States*, 369 U.S. 141. *Fong Foo* upheld a double jeopardy claim presented by two natural persons and one corporation. The court of appeals concluded that the Court's failure to distinguish in *Fong Foo* between the corporation and the natural persons amounted to a holding that there is no constitu-

tional difference in the application of the Double Jeopardy Clause. We disagree.

*Fong Foo* did not discuss the application of the Double Jeopardy Clause to corporations. The issue was not presented as a question for the Court's consideration, and it was not briefed by the parties.<sup>25</sup> The Court did not mention the issue, even in passing. The Court's failure in *Fong Foo* to consider an issue that was not presented by the parties cannot be considered an adjudication of the issue. See *Stone v. Powell*, No. 74-1055, decided July 6, 1976, slip op. 12-14 and nn. 14, 15; *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373, 376 n. 5 (opinion of the Court), 383 (Douglas, J., dissenting). Cf. *Edelman v. Jordan*, 415 U.S. 651, 670-672.

Regrettably, however, the lower courts either feel bound by the implication of *Fong Foo*<sup>26</sup> or assume, without discussion, that the double jeopardy principles applying to natural persons apply equally to

---

<sup>25</sup> The corporate petitioner mentioned the issue only obliquely, in a footnote asserting that it was a "person" within the meaning of the Double Jeopardy Clause. Brief for Standard Coil Products Co., p. 52 n. \*, October Term, 1961, No. 65. The United States did not challenge that statement or raise the issue for the Court's consideration in light of its argument that the district court's "acquittal" was a nullity and that the defendants were subject to a single continuing "jeopardy" after the court of appeals issued its writ of mandamus. See Brief for the United States, pp. 25, 47.

<sup>26</sup> See, in addition to the decision below, *United States v. Southern Ry.*, 485 F.2d 309 (C.A. 4). See also *United States v. Armco Steel Corp.*, 252 F. Supp. 364 (S.D. Cal.).

corporations.<sup>27</sup> There is therefore little prospect of a conflict arising among the circuits until, at a minimum, this Court makes it clear that *Fong Foo* has not foreclosed consideration of the extent to which the Double Jeopardy Clause applies to corporations.

In light of these circumstances, and since this is a fundamental constitutional issue of manifest importance that plainly is suitable for resolution by this Court, there is no reason for this Court to await further consideration of the issue in the lower courts. That course would produce unnecessary litigation in courts that evidently do not feel free to consider the question. More importantly, the fundamental nature of the question is such that its further exploration by the lower courts is unlikely either to assist the Court in deciding it or to obviate the need for that decision.

#### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DANIEL M. FRIEDMAN,  
*Acting Solicitor General.*

RICHARD L. THORNBURGH,  
*Assistant Attorney General.*

FRANK H. EASTERBROOK,  
*Assistant to the Solicitor General.*

JEROME M. FEIT,  
FREDERICK EISENBUD,  
*Attorneys.*

FEBRUARY 1977.

---

<sup>27</sup> See, e.g., *United States v. Martin Linen Supply Co.*, 534 F.2d 585 (C.A. 5), certiorari granted, November 1, 1976 (No. 76-120) (we have not presented the issue in *Martin Linen* because it was not briefed in the court of appeals or explicitly considered by that court).

**APPENDIX A**

**UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

---

No. 282—September Term, 1976

(Argued September 27, 1976  
Decided December 6, 1976)

Docket No. 76-1283

---

**UNITED STATES OF AMERICA, APPELLANT**

*v.*

**SECURITY NATIONAL BANK, DEFENDANT-APPELLEE**

---

**Before:**

**WATERMAN, VAN GRAAFEILAND, *Circuit Judges*,  
MOTLEY, *District Judge\****

---

**VAN GRAAFEILAND, *Circuit Judge*:**

On September 5, 1975, a grand jury sitting in the Eastern District of New York indicted Security National Bank on 9 counts of making unlawful political

---

\* Of the Southern District of New York, sitting by designation.

contributions in violation of 18 U.S.C. § 610. Three of the bank's officers were charged with conspiring to cause the bank to make these unlawful contributions. These same officers were also charged with conspiracy to misapply bank funds in violation of 18 U.S.C. § 656, and one of them was charged with making false statements in violation of 18 U.S.C. § 1001. Following a ten-week trial before Judge Constantino and a jury, verdicts of not guilty were returned as to all charges except one substantive count against an individual defendant. The Government now appeals from the judgment acquitting the corporate defendant, contending that it resulted from erroneous instructions given to the jury by the trial judge. Because we conclude that an appeal cannot be taken from this judgment of acquittal, we do not reach the merits of the Government's contention.

In *United States v. Jenkins*, 490 F.2d 868 (2d Cir. 1973), *aff'd*, 420 U.S. 358 (1975), we held that, despite the 1970 amendment to the Criminal Appeals Act, 18 U.S.C. § 3731, when a defendant has been acquitted after a trial on the merits, the double jeopardy clause of the Constitution precludes appeal by the Government. This, of course, was the well-established rule prior to the amendment. See *United States v. Wilson*, 420 U.S. 332, 352 (1975); *Fong Foo v. United States*, 369 U.S. 141 (1962); *Kepner v. United States*, 195 U.S. 100 (1904). Conceding, as it must, that it is barred from appealing judgments acquitting individual defendants, the Government now contends that a corporate defendant should

not be entitled to the same double jeopardy protection.

This argument is advanced without citation of supporting authority and in the face of substantial authority to the contrary. In *Fong Foo v. United States*, *supra*, 369 U.S. at 143, the Court held that the Court of Appeals erred in setting aside a judgment acquitting a corporate defendant, stating that the double jeopardy provision of the Constitution was "at the very root" of the case and that its guaranty had been violated. Lower court decisions are in unanimous accord. See, e.g., *United States v. Martin Linen Supply Co.*, 534 F.2d 585 (5th Cir.), *cert. granted*, 45 U.S.L.W. 3329 (Nov. 1, 1976); *United States v. Southern Ry.*, 485 F.2d 309, 312 (4th Cir. 1973); *United States v. Armco Steel Corp.*, 252 F. Supp. 364, 368 (S.D.Cal. 1966); *City of Englewood v. George M. Brewster & Son, Inc.*, 77 N.J. Super. 248 (1962). In other cases, such as *Rex Trailer Co., Inc. v. United States*, 350 U.S. 148 (1956) and *American Tobacco Co. v. United States*, 328 U.S. 781 (1946), the Supreme Court has assumed a corporate right to double jeopardy protection by considering claims for such protection on the merits "a quite improper procedure", according to Mr. Justice Jackson, "if the corporation had no standing to raise the constitutional questions." *Wheeling Steel Corp. v. Glan-der*, 337 U.S. 562, 575 (1949).

Because we are not empowered to overrule Supreme Court decisions, *Bank of New York v. Helvering*, 132 F.2d 773, 775 (2d Cir. 1943), the Government seeks

to minimize the precedential authority of *Fong Foo*, contending that the question of the applicability of the double jeopardy doctrine to corporations was not specifically considered by the Court in that case. Reference to the petitioner's brief in *Fong Foo* discloses, however, that this precise issue was raised and briefed. At most, there was a failure by the Court to set forth the reasons why it adopted petitioner's position.

Even if we were to accept the authority which the Government so graciously concedes us, we are presented with no persuasive reasons for exercising it. The Government's technical argument that the Constitution precludes double jeopardy only of "life and limb" was rejected by the Supreme Court many years ago. *See Breed v. Jones*, 421 U.S. 519, 528 (1975). Applied literally, this clause would preclude a defendant being placed twice in jeopardy only for capital felonies, and some early cases so held. *See, e.g., People v. Goodwin*, 18 Johns. 187, 201 (N.Y.Sup.Ct. 1820); *United States v. Gilbert*, 2 Sumner 19, 45 (1st Cir. 1834). However, in *Ex parte Lange*, 85 U.S. 163 (1873), the Supreme Court, recognizing that this constitutional provision was merely an embodiment of common law principles, held that it applied to misdemeanors as well. Although most state constitutions also contain double jeopardy provisions, their phraseology differs from state to state, proscribing double jeopardy "for the same offense", "of life or limb", "of life or liberty", "of punishment", et cetera. *Index Digest of State Constitutions*, 576

(1959). Despite the differences in language, it is generally held that these clauses mean substantially the same thing, *State v. Wolf*, 46 N.J. 301 (1966); *Gomez v. Superior Court*, 50 Cal. 2d 640, 649 (1958); *Stout v. State ex rel. Caldwell*, 36 Okla. 744 (1913); i.e., that one may not be tried a second time for the same offense. *Calvaresi v. United States*, 216 F.2d 891, 902 (10th Cir. 1954), *rev'd on other grounds*, 348 U.S. 961 (1955).

The prohibition against double jeopardy, "one of the oldest ideas found in western civilization", *Bartkus v. Illinois*, 359 U.S. 121, 151 (1959) (Black, J. dissenting), has become "part of our American concept of fundamental fairness." *Brock v. North Carolina*, 344 U.S. 424, 435 (1953) (Vinson, C.J. dissenting). It represents such a "fundamental ideal in our constitutional heritage" that its basic core must be included within the equally fundamental constitutional right of due process. *Benton v. Maryland*, 395 U.S. 784, 794 (1969); *see also United States v. Wilkins*, 348 F.2d 844, 854 (2d Cir. 1965), *cert. denied*, 383 U.S. 913 (1966). We see no valid reason why a corporation which is a "person" entitled to both equal protection and due process under the Constitution, *Wheeling Steel Corp. v. Glander*, *supra*, 337 U.S. at 574, should not also be entitled to the constitutional guaranty against double jeopardy.

The Government argues its cause as if all corporations were industrial giants and all corporate crimes were merely regulatory violations punishable by mod-

est fines. Thus, it seeks to avoid the concept of governmental harassment and oppression which is a basic ingredient of the resistance to double jeopardy. *See Abbate v. United States*, 359 U.S. 187, 189 (1959). Neither corporations nor corporate crimes can be so easily encapsulated. Most New York business corporations, for example, have only a few shareholders, and some have only one. G. Hornstein, *Analysis of Business Corporation Law*, 6 *McKinney's Business Corporation Law*, Appendix 1 at 454. Moreover, many corporations are organized for religious, educational, charitable or social purposes, rather than for the pursuit of profit. It is well-settled, also, that a corporate entity may be guilty of a great variety of criminal acts. *See* 10 *Fletcher Cyc. Corp.* (Perm. Ed.) Chapter 55, § 4951, at 478-83. Indeed, some commentators assert, perhaps a bit enthusiastically, that there is virtually no crime for which a corporation should not be held liable. *See, e.g.*, 3 H. Oleck, *Modern Corporation Law* § 1681, at 727 (1959). The financial penalties for some of these offenses can be substantial indeed. *See, e.g.*, *Standard Oil Co. of Indiana v. United States*, 164 F. 376 (7th Cir. 1908), cert. denied, 212 U.S. 579 (1909); *United States v. Bernstein*, 533 F.2d 775, 809 (2d Cir. 1976) (Van Graafeiland, J., dissenting). Bearing these factors in mind, we are not prepared to accept the Government's contention that "but for the label [a criminal proceeding against a corporation] is little different from a civil case." Government's reply brief at 18.

The small entrepreneur is not spared the embar-

rassment, expense, anxiety and insecurity resulting from repeated trials on criminal charges, simply because he has incorporated his modest business. That a large corporation may have more substantial financial resources is no more valid ground for depriving it of its constitutional rights than is the possession of greater wealth by an individual. Indeed, the larger the corporation, the more likely it is that its shareholders, who in the end must bear the financial burden consequent upon criminal liability, will be completely innocent and unaware of any corporate wrongdoing.

No corporation, large or small, can escape the "incalculable effect" which a conviction may have on the public attitude toward the company. 3 H. Oleck, *supra*, § 1683, at 729 like an individual, it must answer to the "verdict of the community". *Price v. Georgia*, 398 U.S. 323, 331 n.10 (1970). No corporation, no matter how large, can pit its resources against the overwhelming might of the State so as to avoid the harassment and the increasing probability of conviction resulting from prosecutions. Cf. *United States v. U. S. Gypsum Co.*, 404 F.Supp. 619, 621 (D.D.C. 1975). In this unequal contest, "fundamental fairness" requires that the government, having had a full try at establishing criminal wrongdoing, shall not have another.

The appeal is dismissed.

## APPENDIX B

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of December, one thousand nine hundred and seventy-six.

Present: Hon. Sterry R. Waterman  
Hon. Ellsworth A. VanGraafeiland  
Circuit Judges  
Hon. Constance Baker Motley  
District Judge

76-1283

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

PATRICK J. CLIFFORD, DAVID J. DOWD, FRANK B.  
POWELL, AND THE SECURITY NATIONAL BANK,  
DEFENDANTS

SECURITY NATIONAL BANK, DEFENDANT-APPELLEE

Appeal from the United States District Court for  
the Eastern District of New York.

This cause came on to be heard on the transcript  
of record from the United States District Court for

the Eastern District of New York, and was argued  
by counsel.

ON CONSIDERATION WHEREOF, it is now  
ordered, adjudged, and decreed that the appeal from  
the judgment of said District Court be and it hereby  
is dismissed in accordance with the opinion of this  
court.

A. DANIEL FUSARO  
Clerk

by Vincent A. Carlin  
Chief Deputy Clerk